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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
MCI Telecommunications Co., Inc.	)	CC Docket No. 97-100
	)	
Petition for Expedited Declaratory Ruling Preempting Arkansas Telecommunications Regulatory Reform Act of 1997 pursuant to §§ 251, 252 and 253 of the Communications Act of 1934, as amended	)	

AT&T REPLY COMMENTS

AT&T Corp. ("AT&T") submits these reply comments on the petition for expedited declaratory ruling filed by MCI Telecommunications Co., Inc. ("MCI") in the above-entitled proceeding on June 3, 1997. The comments filed in this proceeding confirm that the Commission should preempt enforcement of the provisions of the Arkansas Telecommunications Regulatory Reform Act of 1997 ("Arkansas Act") identified in MCI's petition because they are inconsistent with provisions of the Telecommunications Act of 1996 ("1996 Act" or "Act"), and create barriers to entry in the local telecommunications services market.

ARGUMENT

As the Competition Policy Institute points out, the Arkansas Act "is one of the most anti-consumer and anti-competitive state telecommunications statutes in the

country."[1] "It is hard to imagine a more blatant attempt to protect the incumbents against the effects of Federal policy and the competition that it seeks to encourage."[2] Predictably, the only parties to file comments opposing preemption of the Arkansas Act are its sole beneficiaries -- the incumbent LECs. They have not, however, rebutted the showing by the commenters that the identified provisions of the Arkansas Act conflict with the 1996 Act and therefore are preempted. In fact, their arguments confirm that there is no legitimate basis to refrain from declaring that these provisions are preempted.

The Arkansas Telephone Association ("ATA"), an association of incumbent LECs in Arkansas, including Southwestern Bell ("SWBT"), for example, contends that the Arkansas Act does not mean what it says, and the Commission therefore should ignore its plain language. The ATA thus argues that language of the Arkansas Act that clearly conflicts with the 1996 Act must be read as saying exactly the opposite.[3] If that were true, however, then the ATA would be utterly indifferent to whether the Commission declares that the Arkansas Act has been preempted. But the ATA opposes preemption so that its members may continue to claim that the "plain language" of the Arkansas Act requires a result that is inconsistent with federal law. Although such claims may and ultimately should prove unsuccessful, failing to preempt the identified provisions of the Arkansas Act

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1 CPI Comments, p. 2.

2 ALTS Comments, pp. 3-4.

3 The intent of the Arkansas Act perhaps may be more accurately discerned by the fact that the Arkansas legislature ignored a 28-page analysis by the Arkansas PSC which detailed the numerous ways the legislation conflicted with the 1996 Act and this Commission's implementing regulations. See Exhibit A to AT&T Comments, filed May 5, 1997; Letter from the Arkansas PSC to William Caton, dated June 13, 1997.

now will enable ATA's members to embroil new entrants in costly and time-consuming litigation, to the detriment of competition and consumers.[4]

SWBT argues that even where the Arkansas Act expressly conflicts with the 1996 Act, the Commission cannot preempt such conflicting state requirements if there is any possibility – no matter how remote – that the Arkansas PSC could or would act in any way other than directed by specific state statutory language. None of the cases cited by SWBT, however, provide any support for this remarkable proposition. For example, the state legislation at issue in California Coastal Comm'n v. Granite Rock Co., 480 U.S. 572 (1987), did not directly and expressly conflict with federal statutes or regulations.[5] Instead, the plaintiff was attacking the state's general requirement that it obtain a permit from the state coastal commission. The Court held that this general language was not subject to preemption if the state were able to identify a possible set of permit conditions that were not in conflict with federal law.

In contrast, unlike the state's general permit requirement at issue in California Coastal Comm'n, the Arkansas Act establishes standards for the Arkansas PSC that

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[4] The conflicting positions of the ATA and the Northern Arkansas Telephone Company ("NATCO") further evidence the extent to which entrenched incumbents will go to preserve their favored position. On the one hand, the ATA argues that the Commission cannot even consider whether provisions of the Arkansas Act should be preempted until the Arkansas PSC has the opportunity to promulgate rules and otherwise interpret such provisions. ATA Comments, p. 5. See also Arkansas Attorney General Comments, pp. 17-18. NATCO, however, argues that any and all claims that the Arkansas Act conflicts with the 1996 Act must be heard now or be forever barred. NATCO Comments, p. 3 (the Commission should declare that it will not permit the filing of additional requests for preemption).

[5] Indeed, the Court made clear that "federal legislation necessarily overrides conflicting state laws under the Supremacy Clause," and that state law is preempted "to the extent it actually conflicts with federal law." 480 U.S. at 580, 581.

explicitly conflict with the requirements of the 1996 Act. Moreover, the 1996 Act specifically expresses Congress' intent to preempt state statutes and regulations that are "inconsistent" with the requirements of the Act (§§ 251(d)(3), 254(f), 261(b)), that would substantially impair the requirements of Section 251 (§ 251(d)(3)), and that would prohibit or have the effect of prohibiting the ability of any carrier to provide any telecommunications service (§ 253(a)).

SWBT's reliance upon Chemical Specialties Mfrs. Ass'n v. Allenby, 958 F.2d 941, cert. denied, 506 U.S. 825 (1992) is likewise misplaced. In that case, the plaintiff argued that a state law requirement that chemical manufacturers provide a warning to consumers conflicted with a federal ban on state "labeling" requirements. Because there were various methods of providing such a "warning" that would not conflict with the federal ban on state "labeling" requirements, however, the preemption claim was denied. Again, unlike in this case, the plain language of the state statute did not conflict with federal law. Where, as here, a clear conflict exists between the plain language of state and federal law, the state law is preempted. The Commission thus need not and should not wait to confirm the obvious – the 1996 Act preempts those provisions of the Arkansas Act identified in MCI's petition.

Bell Atlantic and NYNEX contend that so long as a state statute purportedly promotes one of the policies identified in Section 253(b) and is competitively neutral, the Commission lacks authority to preempt under Section 253(a) even if the state requirement

has the effect of prohibiting competitive entry.[6] They are wrong for at least two reasons. First, Congress made clear that the exception provided by Section 253(b) was not intended to swallow the rule established by Section 253(a), and that "[s]tates may not exercise this authority in a way that has the effect of imposing entry barriers" preempted by Section 253(a).[7] Second, the Act makes clear that the only state requirements that come within the protections of Section 253(b) are those that are "necessary" to promote the policy objectives contained in that section. As the Commission has held, in order for a state requirement to be "necessary," it must be more than merely a reasonable means of promoting the listed policy objectives.[8]

Finally, both SWBT and NATCO argue that the Tenth Amendment renders the 1996 Act unconstitutional to the extent it mandates state action to enforce federal requirements. In the first place, the Commission cannot declare an act of Congress unconstitutional. In any event, this contention lacks merit. Congress carefully crafted the 1996 Act to give state public service commissions the option of administering and

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6 Bell Atlantic, NYNEX Comments, pp. 1-2. See also, Arkansas Attorney General Comments, p. 12. They also ignore the preemption authority evidenced in Sections 251(d)(3), 254(f) and 261(b) of the Act, and contend that the Commission's preemption authority is limited to that contained in Section 253(a). They are wrong for the reasons set forth in AT&T's Comments.

7 H.R. REP. No. 104-458, 104th Cong., 2d Sess., p. 126.

8 New England Public Communications Council Petition for Preemption Pursuant to Section 253, 11 FCC Rcd. 19713, 19722-23 (1996); on reconsideration, New England Public Communications Council Petition for Preemption Pursuant to Section 253, CCBPol 96-111, Memorandum Opinion and Order, FCC 97-143 (rel. Apr. 18, 1997), ¶ 7.

enforcing its provisions.[9] Should a state decline to assume such responsibility, the Act requires the Commission to do so. However, once the state assumes the obligations under the Act, it must comply with the substantive standards established by Congress, and implemented through the Commission's regulations.

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[9] See, e.g., FERC v. Mississippi, 465 U.S. 742, 764 (1982) (rejecting Tenth Amendment claim because States retained the option of abandoning utility regulation altogether); Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264, 288-89 (1981) (States wishing to regulate surface coal mining could either comply with mandatory minimum federal standards or yield to federal regulation).

CONCLUSION

The provisions of the Arkansas Act identified by MCI in its petition are inconsistent with federal regulatory objectives and create impermissible barriers to entry into the Arkansas local services market. For the reasons set forth above, the Commission should confirm that these provisions of the Arkansas legislation are preempted by the Act and the Commission's rules.

Respectfully submitted,

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Dated: July 22, 1997

CERTIFICATE OF SERVICE

I, Jackie Brady, do hereby certify that on this 22nd day of July, 1997, a copy of the foregoing "AT&T Reply Comments" was mailed by U.S. first class mail, postage prepaid, upon the parties on the attached service list:

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